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Nos. 89-1391, 89-1392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK HEALTH & HOSPITALS CORP.,

Petitioners,

v.

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF REPRESENTATIVES PATRICIA SCHROEDER, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

[Additional Amici Continued on Inside Cover]

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PAUL SIMON, TIMOTHY WIRTH,
AND FORMER SENATOR GAYLORD NELSON

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BRIEF OF REPRESENTATIVES PATRICIA SCHROEDER, OLYMPIA SNOWE, NITA LOWEY, BILL GREEN, *et al.** AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted in support of petitioners Rust, *et al.*, and the State of New York, *et al.* By letters filed with the Clerk of the Court, petitioners and respondent have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

As members of Congress, *amici curiae* have a particular interest in ensuring that the departments entrusted with the implementation of statutory provisions correctly interpret those provisions. Specifically, *amici curiae* have an interest in ensuring that the Secretary of Health and Human Services properly construes and administers the provisions of Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.* (1982 & West Supp. 1990).

INTRODUCTION

Nearly twenty years ago, Title X of the Public Health Service Act was enacted with broad bipartisan support and with a legislative compromise—section 1008—that balanced the contending views of various of the proponents of the program and the anti-abortion constituency. The family planning program was administered consistently for seventeen years, and Congress easily rebuffed the efforts of a few Members of Congress to enact the very restrictions at issue here.

Suddenly, the Secretary of Health and Human Services announced new regulations in a blatant effort to circumvent the intent of the statute and the political proc-

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* See inside front cover for full list of *amici*.

esses from which it derived. *Amici curiae* include many of the 148 Members of Congress who filed comments with the Secretary opposing this clear abuse of his rulemaking authority. Our interest in this case lies with the preservation of the integrity of a statute that, unless and until *the Congress* acts, is the law of the land.

SUMMARY OF ARGUMENT

We object to two features of the Secretary's new regulations: the prohibition on providing information through neutral, non-directive counseling concerning abortion and referral to abortion providers (section 59.8(a)) and the requirement that Title X programs be carried out in facilities that are physically separate from facilities in which abortion services are provided (section 59.9). As we explain in Point I, the Secretary's prohibition on abortion counseling and referral is utterly inconsistent with the language of Title X, including section 1008. In Point II we establish that, even if section 1008 is not expressed in clear, unambiguous language, the Secretary's new regulations are not based upon a permissible construction of that language. Finally, in Point III, we demonstrate that the Secretary's physical separation requirement is arbitrary and capricious.

ARGUMENT

I. THE UNAMBIGUOUS LANGUAGE OF TITLE X IS INCONSISTENT WITH THE SECRETARY'S REGULATIONS PROHIBITING GRANTS TO PROGRAMS THAT PROVIDE COUNSELING OR REFERRAL FOR ABORTION

The plain meaning of section 1008 is inconsistent with so much of the Secretary's regulations that prohibit nondirective abortion counseling and referral. An administrator has no discretion to "interpret" a statute when "Congress has directly spoken to the precise question at

issue" through the plain language of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984).[1]

A. Section 1008 Prohibits the Use of Title X Funds Only for Programs in Which "Abortion" Is a Method of Family Planning

Section 1008 forbids the use of Title X funds "in programs where abortion is a method of family planning." By its terms, section 1008 prohibits the expenditure of Title X funds only for "abortion," not "abortion counseling" or "abortion referral."

The Secretary asserts that because Title X programs provide, *inter alia*, family planning information, "abortion" is a "method of family planning" in any program that provides information about or referral for abortion. While the Secretary's observation about the scope of Title X services is undoubtedly correct, that observation provides no premise for his conclusion.

The fact that Title X programs may provide information *about* family planning methods does not convert *the information* into a "method of family planning." Despite occasional resort to it, talk is simply not a "method of family planning." The Secretary's contrary reading of the statute finds no support in language or experience. To illustrate the fallacy of the Secretary's reasoning, a Title X program that aggressively counseled its clients *against* abortions would be one in which "abortion" is a "method of family planning" if the program also, no matter how grudgingly or disapprovingly, provided its clients with basic information about abortion. Under any natural reading of the statutory language, this cannot be.

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[1] "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Employees Retirement Sys. v. Betts*, 492 U.S. ——, 109 S. Ct. 2854, 2863 (1989); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

The very absence of any mention of "abortion counseling" or "abortion referral" dispels any ambiguity as to the meaning of section 1008. As Title X is structured, section 1008 sets forth a limited exception to expenditures that, absent section 1008, would be otherwise plainly authorized by the statute.[2] Without compelling evidence to the contrary, it must therefore be presumed that what Congress did not specifically exclude from Title X's "comprehensive" services it necessarily knowingly authorized.[3]

This case is thus not like the usual one in which the absence of explicit mention of a matter in the statute suggests that Congress has "left a gap for the agency to fill [so that] there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. To the contrary, the absence of explicit mention here means that Congress *has* resolved the issue, and that it is not one that was " 'committed to the agency's care by the statute.' " *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

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[2] We do not understand there to be any dispute on this point. Nor could there be. Title X was enacted "to assist in making *comprehensive* voluntary family planning services readily available to all persons desiring such services." Pub. L. No. 91-572, § 2(1), 84 Stat. 1504 (1970) (emphasis added). Those comprehensive services were to include "medical, informational, and educational activities" related to family planning, population research and infertility services. H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News at 5082, Joint Appendix ("J.A.") at 70a (references to the Joint Appendix will be to the Joint Appendix for the briefs on the merits, "J.A. at —," or to the Joint Appendix for the Petition for Writ of Certiorari, "J.A. at —a").

[3] It is this principle that animates the general rule that statutory exceptions are to be read narrowly. *See, e.g., Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). The rule of narrow construction is particularly appropriate in construing exceptions to remedial statutes such as Title X. *Piedmont & Northern Ry. v. ICC*, 286 U.S. 299, 311-12 (1932); *see* 3 N. Singer, *Statutes and Statutory Construction* § 64.08 at 217 (C.D. Sands 4th ed. 1986) (grant-in-aid statutes remedial in character).

Indeed, had Congress intended to prohibit abortion counseling, it would have done so in explicit terms, not by omitting to mention the subject with the hope that the Secretary would fill the statutory void. When counseling a patient about the various methods of contraception, a physician has an obligation to educate the patient about the risks, side effects, and failure rates of each method. Furthermore, the physician must, as a matter of competent medical practice, inform the patient of the available choices in the event of contraceptive failure, choices that include carrying the pregnancy to term, placing the child for adoption, and, whether the Secretary likes it or not, terminating the pregnancy.[4]

II. EVEN IF SECTION 1008 IS AMBIGUOUS, THE SECRETARY'S REGULATIONS ARE NOT BASED UPON A REASONABLE CONSTRUCTION OF THE STATUTE

A. The Secretary's Interpretation of Section 1008 Is Not Entitled to the Usual Deference

When the Court concludes that statutory language is ambiguous, it inquires whether an agency's proffered interpretation is "based on a permissible construction of the

[4] Affidavit of Irving Rust, M.D. (February 5, 1988), J.A. at 251 ("access to information about abortion is essential to the ability of a non-pregnant patient to give informed consent to her choice of contraceptive method. For many patients with diabetes, heart disease, or hypertension, oral contraceptives may present a serious health risk. It is imperative that I inform these patients that use of a diaphragm with the back-up of an early abortion is in fact the safest method of contraception, despite the lower effectiveness rate of the diaphragm versus the pill . . . No responsible family planning decision can be made without information about every alternative available, including that of abortion, in the event that contraceptive failure, occurs . . ."); Affidavit of Raymond Fink, (February 3, 1988), J.A. at 164 (physicians "will be unable to emphasize in a meaningful manner, the importance of family planning and responsible sexual behavior to patients because to do so requires discussion of the success and failure rates of all contraceptive modalities and how these affect one's ability to avoid unintended pregnancy and unwanted childbirth.").

statute." *Chevron*, 467 U.S. at 843 (footnote omitted). Although generally the Court accords "considerable weight" to the agency's construction, deferring to the agency's interpretation of its statutory mandate, *id.* at 842-44, the Court traditionally has refused to defer to an agency interpretation of statutory language if the interpretation is inconsistent with the agency's previous interpretation of the same language. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An additional reason for rejecting the [Government]'s request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years.") (citations omitted).[5]

Although an agency may reexamine and correct prior positions and respond to changing circumstances,[6] when it reverses its position on a question of statutory interpretation, the Court declines to accord the new interpretation the same degree of deference enjoyed by a consistent, long-standing interpretation rendered contemporaneously with the enactment of the statute. This is because con-

[5] This is a time honored rule to which the Court faithfully has adhered both before and after its decision in *Chevron*. *See NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987) ("We also consider the consistency with which an agency interpretation has been applied . . ") (citations omitted); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 134 (1985) ("Here we are not dealing with an agency's change of position with the advent of a different administration, but rather with EPA's consistent interpretation since the 1970's."); *Watt v. Alaska*, 451 U.S. 259, 273 (1981) ("The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference.") (citation omitted); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (refusing to follow agency guideline which "flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute."); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (weight of the agency's interpretation dependent upon, *inter alia*, "its consistency with earlier and later pronouncements of an agency") (citation omitted); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[6] *Chevron*, 467 U.S. at 863-64.

temporaneous administrative construction of a statute is highly persuasive evidence as to the statute's intended effect,[7] particularly where, as here, the agency charged with administering the law was active in the legislative process and, therefore, can be assumed to have especial knowledge of what the legislature intended.[8]

As we explain in greater detail below,[9] the Secretary's ban on abortion counseling and referral in Title X programs is a sharp departure from a long-standing administrative interpretation. As the Court of Appeals explained,

> There is little doubt that the new regulations were intended as a departure from prior administrative practice. While Title X funds were never permitted in the past to be used either to perform or to subsidize actual abortions, . . . administrative interpretations at first permitted, and later required, Title X projects to provide information about, and referral for, abortions, including names and addresses of abortion clinics . . . .

889 F.2d 401, 404 (2d Cir. 1989), J.A. at 42a (citations omitted). This complete reversal deprives the Secretary's

[7] *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[8] *See United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982); *Miller v. Youakim*, 440 U.S. 125, 144 (1979). The Secretary of Health, Education and Welfare, the Assistant Secretary for Health and Scientific Affairs, the Deputy Assistant Secretary for Population Affairs, and the Director of the Office of Population and Family Planning were each highly active in the legislative process culminating in the enactment of Title X. *See, e.g., Family Planning Services: Hearing on H.R. 15159, H.R. 9107, H.R. 9108, H.R. 9109, H.R. 15691, H.R. 11123 and S. 2108 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 84-5 (1970) (statement of Elliot L. Richardson, Secretary of Health, Education and Welfare) ("It is clear that the administration and the sponsors of S. 2108 have essentially the same goals, and we have worked closely with the Senate sponsors on this legislation in an effort to minimize our differences.").

[9] *See infra* at pp. 13-15.

new interpretation of Title X of the deference an administrator usually enjoys.[10]

B. The Secretary's Regulations Are Not Based Upon a Permissible Construction of Section 1008

The Court should reject the Secretary's interpretation of section 1008 as not "reasonable, in light of the language, policies, and legislative history" of the statute. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

1. *The Secretary's Interpretation of Section 1008 Thwarts the Overriding Purpose of Title X*

The Secretary's principal justification of his interpretation of section 1008 is unusual. He argues less that his interpretation is correct as a matter of statutory construction and more that it better effectuates the intention of Congress in enacting section 1008. 53 Fed. Reg. 2922, 2923 (1988). In so doing, the Secretary has disregarded the overall purpose and rationale of Title X, while misconceiving the more limited purpose of section 1008.

Title X is not an anti-abortion statute. It was enacted "to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services." Pub. L. No. 91-572, § 2(1), 84 Stat. 1504 (1970). Those comprehensive services were to include "medical, informational, and educational activities" related to family planning, population research and in-

[10] Indeed, the Secretary's interpretation may be entitled to no deference at all. When faced with a "pure question of statutory construction," a question for the judiciary to decide, the Court need not defer to the agency. Rather, the Court resolves the issue for itself, "employing traditional tools of statutory construction." *Cardoza-Fonseca*, 480 U.S. at 446-47; *United Food & Commercial Workers Union*, 484 U.S. at 123; *see also Chevron*, 467 U.S. at 843 n.9 ("the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent").

fertility services. H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News at 5082, J.A. at 70a. Congress did not consider family planning to be "merely a euphemism for birth control." S. Rep. No. 1004, 91st Cong., 2d Sess. 10 (1970). Indeed, the Senate Report underlined that a "successful family planning program" should provide "consultation" and "referral to other medical services as needed." *Id.*

The history of Title X clearly supports the notion that, when properly construed, section 1008 allows Title X programs to achieve both Title X's goal of providing comprehensive information and section 1008's goal of prohibiting federal funding of abortion. When Title X was enacted, all states allowed abortions under at least some circumstances, and the clear trend was toward liberalized legalization.[11] Of course, the propriety of abortions was, and is, hotly disputed. In the course of hearings by the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce, several opponents of the legislation that became Title X expressed concern that its effect would be to fund abortions.[12]

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[11] Thirty-three states allowed abortions to save the life (or, sometimes, the physical health) of the woman; thirteen states allowed abortions when the pregnancy would endanger the physical or mental health of the woman, when the child would be born with grave physical or mental problems, and in cases of rape or incest; four states allowed abortions for any reason when performed by a licensed physician during the early stages of pregnancy. *See* Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 Am. J. Pub. Health 500, 500-01 (March 1971). For discussion of the trend in the early 1970s toward liberalizing abortions laws, see 116 Cong. Rec. 10,278 (1970) (statement of Sen. Tydings on need to re-examine abortion laws); *id.* at 24,096 (statement of Sen. Packwood supporting liberalization of abortion laws); George, *The Evolving Law of Abortion*, 23 Case W. Res. L. Rev. 708 (1972); Note, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. Ill. L. Forum. 177.

[12] *See, e.g., Family Planning Services: Hearing* at 240 (testimony of Mrs. D.R. Mogilka, Chairman, Reverence for Life of America); *id.* at 359 (testimony of Rev. James T. McHugh, Director, Family Life Division, U.S. Catholic Conference); *id.* at 369 (testimony of Mrs. R. Kuffel, National Coordinator of Civic Awareness of America); *id.* at 382 (testimony of Dr. John F. Hillabrand).

To meet these concerns, the full committee, at the behest of Representative John D. Dingell, added section 1008, entitled "Prohibition of Abortion." H.R. Rep. No. 1472, 91st Cong., 2d Sess. 4 (1970). The legislation was passed by the House in this form, and the Conference Committee adopted the House version. Significantly, the Conference Committee also described section 1008 as prohibiting "the use of [Title X] funds *for abortion*." H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8 (1970), J.A. at 70a (emphasis added).

The only extended explication of section 1008 was set forth in a revised and extended floor statement by Representative Dingell. The statement is explicit that the focus of section 1008 was the prohibition of abortions. It emphasized that a principal concern of Congress was to prevent Title X, through operation of the supremacy clause, from becoming the vehicle through which abortion was rendered legal nationwide.

> None of the 50 States currently sanction abortion as a method of family planning. The criminal codes of most States sanction abortion only in certain strict and clearly-circumscribed cases. Even the broadest interpretation of these laws would not lead one to the conclusion that they in any way allow for such a procedure as an accepted method of family planning. *For the Congress of the United States to appropriate funds for a procedure which would violate the criminal law of a vast majority of American jurisdictions would be to raise constitutional questions of a most serious nature. . . .*

116 Cong. Rec. 37,379 (1970) (statement of Rep. Dingell) (footnote omitted) (emphasis added).

Representative Dingell's lengthy statement, which we urge the Court to read in its entirety, makes no mention of abortion counseling or referral. Indeed, there is not a

single statement in any of the Title X committee reports or floor debates that mentions counseling or referral.[13]

Representative Dingell's reassurance that "abortion is not to be encouraged or promoted in any way through this legislation," 116 Cong. Rec. 37,375, meant, as Representative Dingell himself has confirmed,[14] no more than what he said—that the *effect* of Title X would not be to increase the availability of abortions.[15] There is no support for reading into that statement an otherwise unstated intent to preclude any mention of abortion during counseling or to preclude referral to other health care providers that could legally perform abortions in their state.

The Secretary's central justification for his actions is that providing neutral, factual information about abor-

[13] Subcommittee testimony by Monsignor Alphonse S. Popek, inveighing against abortion and abortion counseling, does not shed light on the meaning of section 1008. *Family Planning Services: Hearing* at 321-22. Msgr. Popek also opposed the bill in its final form, predicting that, as a result of the legislation, "[b]efore long 'life control' and 'death control' within each State of the Union will fall before the monstrous sovereign dictatorship of the Federal Government . . .," and that the "horrendous Hitlerian experiment, to propagate his superrace, will be repeated. . . ." 116 Cong. Rec. 37,383 (1970). The Court need not view Msgr. Popek's testimony as a reliable barometer of Congressional intent.

[14] Representative Dingell filed comments with the Secretary opposing the misreading of his statements. He emphasized that "[m]y remarks did not suggest—either expressly or implicitly—that the legislation being considered intended or required a prohibition on non-directive counseling or referral of pregnant women to abortion facilities." Comments of Chairman John D. Dingell, Committee on Energy & Commerce, on Proposed Rules 42 CFR Part 59—Fed. Reg. Notice, Sept. 1, 1987 (Oct. 14, 1987) at 2.

[15] In much the same way, statements by proponents of the pending legislation, such as Dr. Alan Guttmacher (also a leading proponent of the legalization of abortion), to the effect that one of the beneficial collateral consequences of Title X would be to reduce the number of abortions by reducing the number of unwanted pregnancies, cannot fairly be read as suggesting that the animating purpose behind Title X was to reduce the availability of abortions.

tion constitutes "encouragement" of abortion, and that the statute mandates ignorance instead. 53 Fed. Reg. 2923, 2933. The Secretary could not be more wrong. Congress emphatically rejected the notion that the provision of non-directive information constitutes "encouragement" or "promotion." Members of Congress repeatedly stressed that the very purpose of Title X was to enable "all individuals . . . to have the opportunity, within the dictates of their conscience, to exert control over their own life destinies." 116 Cong. Rec. 24,092 (1970) (statement of Sen. Eagleton).[16] Title X itself provides that "[t]he acceptance by any individual of family planning services . . . shall be voluntary." 42 U.S.C. § 300a-5 (1982). Congress sought to facilitate this voluntary action by providing accurate, comprehensive information. *See, e.g.*, 116 Cong. Rec. 37,388 (1970) (statement of Rep. Burke) (purpose of Title X is "to provide information, including educational materials . . . to enable people to do what their conscience dictates is proper or advisable in their own situation."); *id.* at 37,382 (statement of Rep. Rogers); *id.* at 37,375 (statement of Rep. Broyhill). By withholding information from Title X beneficiaries, the Secretary prevents them from making the truly informed, voluntary family planning decisions that Congress intended to facilitate.

2. *The Secretary's New Regulations Are Inconsistent with the Contemporaneous and Consistent Administrative History of Section 1008*

Not once, in the seventeen years after the enactment of Title X, did the Secretary even suggest that section

[16] *See also* 116 Cong. Rec. 37,375 (1970) (statement of Rep. Broyhill) ("[I] would like to emphasize that the programs involved here involve only voluntary family planning assistance. The record should be abundantly clear that it is not the intent of Congress that any such program should interfere with the religious or moral beliefs of individual Americans."); *id.* at 37,388 (statement of Rep. Matsunaga) ("We must be very careful to safeguard the religious and moral convictions of all of our citizens, and I am convinced that [Title X] does precisely that.").

1008 prohibited the provision of information about abortion or referral for abortion. The earliest regulations for the Title X program, issued in 1971, required that all Title X grantees provide "medical services related to family planning including . . . necessary referral to other medical facilities when medically indicated," and "social services related to family planning, including counseling. . . ." 36 Fed. Reg. 18,465, 18,466 (1971). Title X grantees were also required to make provision for "coordination and use of referral arrangements with other providers of health care services. . . ." *Id.* at 18,466.

Guidelines issued by the Secretary in 1976 and 1981 stated that abortion referral and counseling "*must* [be] provide[d]" by Title X recipients.[17] In 1978 the Secretary filed an *amicus* brief in the Eighth Circuit arguing that Title X *required* referrals, at least for medically-indicated abortions.[18]

Numerous interpretations within the Department were to the same effect. Only months after Title X was enacted, the Office of General Counsel expressed its understanding that section 1008 prohibited only the *provision* of abortions.[19] In 1976, the Office of Population Affairs

[17] Department of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services*, §§ 7.4, 8.0, 8.1 and 8.6 (1981), J.A. at 71a (emphasis added); *accord* Department of Health, Education and Welfare, *Program Guidelines for Project Grants for Family Planning Services* (Jan. 1976), J.A. at 72a.

[18] *See* Brief of the Secretary of Health and Human Services in *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981), J.A. at 72a. That case held that a state statute's prohibition on using public funds for abortion referral violated the supremacy clause because it "[ran] afoul of Title X's mandate that comprehensive health care be provided." 661 F.2d at 102.

[19] *See* Memorandum from Joel M. Mangel, Deputy Asst. General Counsel, Department of Health, Education and Welfare, to Louis M. Hellman, M.D., Deputy Asst. Sec'y for Population Affairs (Apr. 20, 1971), J.A. at 35 (collection of data relating to subject of abortion would not violate section 1008 since it "does not itself involve the provision of abortions").

directed that, although section 1008 prohibited *directive* counseling on abortion, a counselor in a Title X program had "not only a First Amendment right but duty to inform a patient of *all legal options*." [20] The Department's consistent construction of section 1008 was summarized in a 1978 Office of General Counsel opinion, stating: "provision of information concerning abortion services, [or] mere referral of an individual to another provider of services . . . are not considered to be proscribed by § 1008." [21] Again, in 1979, the Department reiterated its position that "[t]he provision of information on abortion services and the mere referral of a patient to another provider for such a procedure are permissible." [22]

3. *Subsequent Actions by the Congress Are Consistent with the Contemporaneous Legislative and Administrative History*

Under settled principles, " 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. . . .' " [23] This presumption is even greater when Congress reenacts the

[20] Letter from Louis M. Hellman, M.D., Deputy Asst. Sec'y for Population Affairs, to Hilary H. Connor, M.D., Regional Health Administrator (Nov. 19, 1976), J.A. at 74a (emphasis added).

[21] Memorandum from the Office of General Counsel, Department of Health, Education and Welfare (Apr. 14, 1978), J.A. at 73a.

[22] Memorandum from Louis Belmonte, Regional Program Consultant (May 25, 1979), J.A. at 75a; *see also* Memorandum from Department of Health, Education and Welfare (July 25, 1979), J.A. at 73a ("a [Title X] project *may*, consistent with section 1008, make 'mere referrals' for abortion") (emphasis in original).

[23] *Lindahl v. OPM*, 470 U.S. 768, 782 n.15 (1985) (citations omitted); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 n.66 (1982); *see also United States v. Rutherford*, 442 U.S. 544, 554 (1979) (citations omitted) (deference to an administrative interpretation of a statute "is particularly appropriate where . . . an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives.").

statute after the agency's construction has been "fully brought to [its] attention." [24]

Congress has been acutely aware of the Department's consistent interpretation of section 1008 and has reauthorized Title X six times since 1970 [25]. Moreover, during that time Congress repeatedly refused to enact legislation that would have overturned the Department's consistent interpretation.

a. *Congress Has Been Well Aware of the Department's Interpretation of the Statute*

Title X has been subject to unusually close scrutiny by Congress. *See, e.g.*, 121 Cong. Rec. 9,790 (1975) (statement of Sen. Cranston) ("The committee has also been watching the administration of these programs very closely."). In addition, agency reports and General Accounting Office ("GAO") audits have fully apprised Congress that Title X grants have been made to programs that counsel or refer for abortions.

As originally enacted, Title X required the Secretary to submit a "five-year plan" and annual progress reports to Congress setting forth goals for the program and a plan to reach those goals. Pub. L. No. 91-572, § 5, 84 Stat. 1504, 1505 (1970). The first five-year plan, submitted to Congress by the Secretary in October 1971,

[24] *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (citations omitted); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983); *Kay v. FCC*, 443 F.2d 638, 646-47 (D.C. Cir. 1970) ("[A] consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval.").

[25] Title X was reauthorized in 1973. Pub. L. No. 93-45, 87 Stat. 91. It was reauthorized again in 1975, Pub. L. No. 94-63, 89 Stat. 304, again in 1977, Pub. L. No. 95-83, 91 Stat. 383, again in 1978, Pub. L. No. 95-613, 92 Stat. 3093, again in 1981, Pub. L. No. 97-35, 95 Stat. 357, and again in 1984, Pub. L. No. 98-512, 98 Stat. 2409. *See also* H.R. Rep. No. 159, 99th Cong., 1st Sess. 2 (1985) (summarizing history). Since 1985 the Title X program has been funded through a series of continuing resolutions.

made clear that the Secretary interpreted section 1008 as prohibiting grants only to programs that actually performed abortions for contraceptive purposes.[26] The Secretary also recognized that "even the most effective contraceptives have failure rates which result in unwanted pregnancies and *some persons will seek assistance in terminating the pregnancy.*" [27]

In 1974 the House Committee on Interstate and Foreign Commerce noted that "[t]his [Five-Year] Plan and the annual reports submitted to Congress outlining progress toward filling its objectives have made possible Congressional evaluation of existing policies and practices in the field, and determination of the need for new ones." [28] The following year Congress amended Title X to require annual reports to the Congress on the Department's plans for the succeeding five years of the program.[29]

In addition to the annual reports, in 1981 Senators Orrin Hatch and Jeremiah Denton commissioned a special audit of the Title X program to see whether section 1008's prohibition against funding of abortions as a method of family planning was being properly enforced. The Comptroller General's report, issued the following year, expressly noted that the Department had long taken the position that a Title X grantee may:

—provide information about abortion services;

[26] *Report of the Secretary of Health, Education and Welfare Submitting Five-Year Plan for Family Planning Services and Population Research Programs for the Special Subcomm. on Human Resources of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 319 (1971).

[27] *Id.* at 82 (emphasis added).

[28] H.R. Rep. No. 1161, 93d Cong., 2d Sess. 15 (1974); *see also* H.R. Conf. Rep. No. 1524, 93d Cong., 2d Sess. 59 (1974) ("Congress has received an accurate view of progress from year to year, and local and Federal administrators have been able to evaluate program effectiveness rapidly and with precision.").

[29] Pub. L. No. 94-63, Title II, § 203(a), 89 Stat. 304, 307 (1975).

—provide the name, address, and the telephone number of abortion providers; . . .

—inspect facilities to determine their suitability to provide abortion services; and

—pay dues to organizations that advocate the availability of abortion services.[30]

The report contained the following conclusions:

—GAO found no evidence that title X funds had been used for abortions or to advise clients to have abortions.

—We did not find any evidence . . . that pregnant women were advised to have abortions.

—Clinic officials said they always emphasized a nondirective and unbiased approach to counseling pregnant women. Interviews with several counselors showed that they were aware of restrictions against encouraging or advising clients to have abortions.[31]

b. *Congress Repeatedly Has Reauthorized Funds for Title X*

Congress' consistent reauthorization of Title X, in light of the agency's understanding of its mandate, is persuasive evidence that Congress acquiesced in the agency's interpretation.[32] Indeed, the committees charged with enacting Title X (as opposed to appropriations committees) and overseeing its implementation are the very com-

[30] Report by the Comptroller General, *Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification* 12 (Sept. 24, 1982), J.A. at 107.

[31] *Id.* at i, 16, 17, J.A. at 82, 112-14.

[32] Reauthorization without change of a federal grant statute, like other reenactments, is probative of legislative acquiescence in an existing interpretation. *See Grove City College v. Bell*, 465 U.S. 555, 568-69 n.19 (1984); *United States ex rel. TVA v. Two Tracts of Land*, 456 F.2d 264, 267 (6th Cir.) (repeated appropriations in face of objections to interpretation supported interpretation); *cert. denied*, 409 U.S. 887 (1972).

mittees responsible for reauthorizing it.[33] Congress has revisited Title X both in its oversight and its authorizing capacity and, by reauthorizing Title X, has accepted and extended the agency's contemporaneous construction of section 1008.

c. *Congress Repeatedly Has Refused To Enact Legislation that Would Impose the Restrictions the Secretary Now Seeks To Impose*

Between 1974 and 1975, Congress considered and rejected three amendments to Department of Health and Human Services appropriations bills that explicitly would have prohibited the use of federal funds for abortion referral services or for the promotion or encouragement of abortion. *See* 120 Cong. Rec. 21,687-95 (1974); *id.* at 31,452-58, 121 Cong. Rec. 20,863-64 (1975).

In 1978, Representative Robert Dornan repeatedly sought to amend section 1008 because it was not preventing Title X funds from being used for counseling and referral activities that included abortion as an option.[34]

[33] An "authorizing committee" is "a standing committee of the House or Senate with legislative jurisdiction over the subject matter of those laws, or parts of laws, that set up or continue the legal operations of Federal programs or agencies." G.A.O., *A Glossary of Terms Used in the Federal Budget Process* 39 (1981); *see also id.* at 5. Furthermore, as the Rules of the House of Representatives direct, "[e]ach standing committee (other than the Committee on Appropriations and the Committee on the Budget) shall review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee and the organization and operation of the Federal agencies and entities having responsibilities in or for the administration and execution thereof, *in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed, or eliminated.*" Rules of the House of Representatives, 101st Cong., 2d Sess. X.2(b)(1) (1990) (emphasis added).

[34] To demonstrate how the Secretary had interpreted section 1008 and how Title X funds were being spent, Representative Dornan

These attempts were all defeated. 124 Cong. Rec. 37,044-48.[35] In 1985 Representative Jack Kemp and Senator Hatch also made unsuccessful attempts to add to the appropriations bill for Title X a provision specifically prohibiting abortion counseling and referral. 131 Cong. Rec. 28,166 (1985) (statement of Sen. Hatch).[36] The amendment, also, did not pass. Representative Kemp also tried to add language prohibiting use of Title X funds to refer pregnant women for abortions. *See Congressional*

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put in the record an extensive article that detailed the legislative history of section 1008 and that concluded "[t]here is apparently no basis, in light of the legislative history of Section 1008, for believing that the prohibition of Title X funds for 'abortion as a method of family planning' was intended to include a prohibition of the use of such funds for abortion counseling and referral. . . . In fact, it is apparent that Congress does not believe that the language of the [Act] prohibits abortion referrals or counseling, or even promotion or encouragement of abortion. . . ." 124 Cong. Rec. 31,243-44 (1978). Representative Dornan also noted that Department of Health and Human Services regulations "require referral for abortion, or abortive counseling under the heading of 'pregnancy counseling,'" *id.* at 31,244, and he put in the record an article showing that HHS program guidelines required counseling on the option of pregnancy termination for women who become pregnant while wearing an IUD or after having received DES. *Id.* at 31,245-46.

[35] That in the course of this extended debate Representative Dornan quoted from a letter written by Representative Rogers that suggests that the Congressman thought counseling and referral were already prohibited by section 1008 is irrelevant. *See* 124 Cong. Rec. 37,046. What is centrally relevant is what Congress did—it rejected the various amendments that would have overturned the Department's practice of providing Title X grants to programs that provide abortion counseling and referrals.

[36] That same year the House Committee on Energy and Commerce noted its disapproval of "proposed amendments that would affect the interpretation and implementation of [section 1008]. . . . The Committee does not intend—and would discourage—regulatory efforts to modify restrictions that the Committee has chosen to retain. *Previous efforts to create restrictions beyond the original intent of the law have been unnecessary and without statutory foundation.*" H.R. Rep. No. 159 at 6-7 (emphasis added).

Quarterly Weekly Report 2,589-90 (Dec. 7, 1985) (reporting on H.J. Res. 465). The House Committee on Appropriations rejected[37] that language as well.[38]

The following year, Congress instructed the Secretary not to change administrative policy regarding nondirective counseling. The Conference Committee Report accompanying that year's appropriations bill for Title X stated that the Secretary should "administer the program for FY 1987 in the same manner, and under the same allocation formula which governed program operations during FY 1986." H.R. Conf. Rep. No. 960, 99th Cong., 2d Sess. 12 (1986).[39]

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[37] Moreover, Congress consistently has appropriated funds for Title X without attempting to use the appropriations process to amend Title X to prohibit counseling and referral for abortion. Congress' decision not to do so cannot be attributed to mere omission, for the annual appropriations process has been the principal vehicle through which abortion restrictions, including the Hyde Amendment, have been implemented over the last fifteen years. *See, e.g.*, Senate Republican Policy Committee, *The Hyde Amendment: A Legislative History of Abortion Funding Restrictions on the Labor-HEW Appropriations Bill, reprinted in* 127 Cong. Rec. 10,677-83 (1981); 36 *Congressional Quarterly Almanac* 467-68 (1980) (describing history of anti-abortion riders to appropriations bills during the period from 1973 to 1980).

[38] Instead, the Committee included in the resolution language offered by Representative Richard Durbin prohibiting use of Title X funds for "advocating" abortions unless the woman's life was endangered. *Congressional Quarterly Weekly Report* at 2,590. The Appropriations Committee Report accompanying the resolution makes clear that the Committee did not equate advocacy of abortions with counseling and referral. H.R. Rep. No. 403, 99th Cong., 1st Sess. 6 (1985).

The Committee report's language was taken verbatim from the 1981 Guidelines for Title X programs, which required that nondirective counseling be provided upon request. *See supra* p. 14 & n.17. In a later compromise the committee language was dropped in return for an agreement barring Representative Kemp from offering his language as a floor amendment. *See Congressional Quarterly Weekly Report* at 2,590.

[39] Similar language restricting the Secretary's authority to promulgate new regulations was deleted by the Conference Committee

III. THE SECRETARY'S RESTRICTIONS ON THE PHYSICAL LOCATION OF TITLE X GRANTEES ARE CONTRARY TO STATUTORY INTENT AND ARE AN IRRATIONAL RESPONSE TO A NON-EXISTENT PROBLEM

Many Title X-funded programs are located in the same building or otherwise share physical facilities with reproductive or other general health care programs.[40] Section 59.9 of the Secretary's new regulations requires Title X-funded programs to maintain separate office space and treatment facilities and to use separate personnel, even if doing so requires substantial expenditures on duplicated facilities and decreases the ability of Title X grantees to coordinate their programs with those of other health care providers. These physical separation requirements are arbitrary and capricious.

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on the Fiscal Year 1988 Continuing Resolution in proposed form, because "[t]he administration insisted that this language would subject the conference report to a veto. Instead, the conferees included report language stressing the importance of making changes in this program through the authorizing process, rather than bypassing that process and utilizing regulations to propose changes that would otherwise be rejected." 133 Cong. Rec. H12,004-05 (daily ed. Dec. 21, 1987) (statement of Rep. Jamie Whitten, Chairman of the House Appropriations Committee).

Representative Whitten went on to explain that the conferees' action in deleting the restrictive language was not an endorsement of the proposed regulations. *Id.* at 12,005. Even so, the Conference Report noted that "[t]he Senate conferees and some House conferees believe that changes to existing law must be achieved through shared adherence to the constitutional process and express disagreement with the executive's bypassing that process through a regulatory device." H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. (1987), *reprinted in* 133 Cong. Rec. 12,709-10 (1987).

[40] In 1982 the Department of Health and Human Services estimated that 74 organizations receiving Title X funds also performed abortions at clinics collocated with the Title X clinic. Report by the Comptroller General 7, J.A. at 100.

A. The Requirement of Physical Separation Is Unsupported by Any Rational Consideration of the Connection Between the Facts Available to the Secretary and His Chosen Regulatory Means

The Secretary's physical separation requirement is not based upon any rational connection between the facts available to the Secretary and his chosen regulatory action. As the Court has explained, "[i]t is an axiom of administrative law that an agency's explanation of the basis for its decision must include a 'rational connection between the facts found and the choice made.'" *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 625 (1986) (plurality) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Ltd. v. United States*, 371 U.S. 156, 168 (1962))). If the agency has "offered an explanation for its decision that runs counter to the evidence before the agency," the Court will invalidate the agency's decision as arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. To determine whether there is a rational connection between the facts before the agency and the choice the agency has made, the court does not merely skim the facts available to the agency in search of any plausible connection between the facts and the agency's action. Rather, the court examines the information available to the agency, searching for a rational connection between that information and the agency's action.[41]

The requirement of physical separation rests on the Secretary's finding that:

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[41] "Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action. To the contrary, the 'presumption of regularity afforded an agency in fulfilling its statutory mandate' is not equivalent to 'the minimum rationality a statute must bear in order to withstand analysis under the due process clause.'" *American Hosp. Ass'n*, 476 U.S. at 626-27 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 n.9 (1983)).

> [M]eeting the requirement of section 1008 *mandates* that Title X programs be organized so that they are physically and financially separate from other activities which are prohibited from inclusion in a Title X program. Having a program that is separate from such activities is a *necessary predicate* to any determination that abortion is not being included as a method of family planning in the Title X program.

53 Fed. Reg. 2,940 (emphasis added).

In announcing the new rules, the Secretary did not even attempt to support this finding.[42] Indeed, the experience of the Department in administering Title X belies the Secretary's claim of any need for the separation requirements. *See supra* at pp. 17-18 (discussing Comptroller General's Report); *see also* H.R. Rep. No. 159, 99th Cong., 1st Sess. 6 (1985) ("[I]n 1984, Secretary Heckler testified before the Subcommittee . . . that Title X grantees 'have been very aware and have honored the law in terms of the abortion prohibition . . .' This view was reiterated by the Acting Assistant Secretary . . . during the Subcommittee's 1985 Title X hearings.").[43]

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[42] While elsewhere in the preamble to the regulations the Secretary relies on reports issued by the General Accounting Office and the Department's Inspector General, 53 Fed. Reg. 2,923-24, these reports were not offered in support of the Secretary's finding that section 1008 "mandated" the physical separation requirements. This is because neither report supports this finding; both conclude that there have been few violations of the section 1008 proscription.

[43] To the extent that the Secretary relies upon the GAO's suggestion that he clarify the requirements of section 1008, 53 Fed. Reg. 2,923-25, that suggestion in no way justifies the drastic separation requirements the Secretary now imposes. The GAO's overall conclusion was that Title X-funded clinics were in substantial compliance with section 1008. *See* Report by the Comptroller General, J.A. at 82, 84, 86.

To the extent that the Secretary relies upon anecdotal evidence of noncompliance with earlier requirements that counseling be non-

Much of the experience of the federal government suggests that the Secretary is quite wrong in suggesting that physical separation is necessary to enforce the prohibition on the use of Title X funds for abortion. Grantees and contractors who do business with the federal government are subjected to a multitude of prohibitions, some concerning only the use of the funds supplied, *see, e.g.*, 2 U.S.C. § 441c (1988) (prohibitions on use of funds for political contributions), and some that are program or project-wide, *see, e.g.*, 41 C.F.R. § 60 *et seq.* (1989) (non-discrimination provisions). Yet it has never been seriously suggested that enforcement of these prohibitions requires the physical separation of the project receiving the federal funds from the remainder of an enterprise.

B. The Secretary's Failure To Consider the Oppressive Cost of the Physical Separation Requirement Renders the Requirement Arbitrary and Capricious

By failing to consider the prohibitive cost of complying with the physical separation requirements, and the effects of that cost, the Secretary has failed to consider an important aspect of the problem.[44] As originally proposed, section 59.9 required the Secretary to deny funding to any Title X grantee located in the same building as an abortion provider. Common office entrances and exits were prohibited, and the use of common street or mailing addresses "presumptively constitute[d] a failure to separate adequately Title X-funded programs from other programs which include abortion as a method of family planning . . . ." 52 Fed. Reg. 33,214 (1987). Merely leasing space in the same one-story building and

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directive, 53 Fed. Reg. 2924-25, none of the examples have anything to do with the location of abortion providers relative to Title X grantees.

[44] As the Court stated in *Motor Vehicle Manufacturers Association*, "normally, an agency rule would be arbitrary and capricious if the agency has . . . *entirely failed to consider an important aspect of the problem* . . . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (emphasis added).

sharing a common waiting area automatically resulted in a finding that the Title X program was "not 'separate and distinct, financially and physically,' from abortion-related activities." *Id.*[45]

The Secretary's proposals generated numerous comments concerning their oppressive cost. In promulgating the final rule, the Secretary conceded that "[m]any comments, particularly those from state and local governmental organizations, argued that the proposed restrictions would require a substantial investment in duplicate facilities, personnel and so on, which would render Title X funds uneconomic to accept." 53 Fed. Reg. 2,938-39.

The Secretary's response was to change the proposed *per se* rules into "indicia of separation," to be considered on a case-by-case basis. Apparently, the Secretary believed that this change relieved him of any responsibility to ascertain the likely impact of the rules. His response to the comments concerning cost was that, like Scarlett O'Hara, he would think about it tomorrow:

> Because of the adoption of a case-by-case determination . . . it is not possible to determine with any precision the costs that grantees will face in accommodating to the rules. However, the Department would note that most of the actual or apparent requirements of proposed § 59.9 that caused the most concern regarding costs, such as the stated requirement for separate entrances and exits and the apparent (although unintended) requirement to repave parking lots, no longer constitute *per se* tests under rules below. Certainly, the Department at this point does not have complete data about each of the 4,000 clinics presently in the program so that it could determine how much, if any, expense each would incur to maintain program integrity.

[45] The regulation left open the possibility of some shared resources "in exceptional cases where, as in the example of a large metropolitan hospital with abortion and family planning services located in different wings, the fact of physical separation is otherwise established and no use of appropriated funds in an ineligible program is likely." *Id.*

Id. at 2,940. The Secretary virtually conceded that he had no informed view as to the costs of complying with his physical separation rule or as to its resultant impact upon the availability of Title X services. His inability to reach an informed view of the cost of his own regulations evinces the lack of a sufficient factual basis for his decision. As the Court has explained,

> It is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion. Recognizing that policy making in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions. . . . [T]he agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'

Moton Vehicle Mfrs. Ass'n, 463 U.S. at 52 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

C. The Regulation Frustrates Statutory Intent To Facilitate Provision of Health Care Services to Title X Patients

1. *Title X Is Intended To Integrate, to the Maximum Extent Feasible, Family Planning and Other Health Care Programs*

From the outset, the Department sought to integrate Title X programs with other health care facilities in order to facilitate the statutory goal of "making comprehensive voluntary family planning services readily available to all persons desiring such services." Pub. L. No. 91-572, § 2(1), 84 Stat. 1504 (1970). The Secretary's first five-year plan set forth as its goal the establishment of family planning programs in a wide variety of preexisting health care facilities, including private physicians' offices, voluntary agencies, local health departments, obstetrics clinics, and hospitals. Included in

that goal was the integration of family planning and pregnancy or abortion services:

> Effective interrelationships with the total health care system for the benefit of the patient also requires that the project provide orientation in family planning to the personnel of other health and social service programs which are, or may become *sources of referral*, such as hospital emergency rooms, outpatient clinics, drug rehabilitation programs, VD clinics, *abortion clinics*, and welfare programs.[46]

Accordingly, since 1971 the agency has made Title X grants to programs collocated with abortion providers.[47]

Subsequent pronouncements by Congress confirm the statutory intent of facilitating wide access to family planning services through "close coordination and, whenever possible, integration of family planning services into all general health care programs. . . . [T]he conferees believe that family planning services under title X generally are most effectively provided in a general health setting and thus encourage coordination and integration into programs offering general health care."[48] Although

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[46] *Report of the Secretary of Health, Education and Welfare Submitting Five-Year Plan for Family Planning Services and Population Research Programs for the Special Subcomm. on Human Resources of the Senate Comm. on Labor and Public Welfare*, 92 Cong., 1st Sess. 318 (1971) (emphasis added).

[47] *See* Memorandum from Joel A. Mangel, Deputy Ass't General Counsel, to Louis M. Hellman, M.D., Deputy Ass't Secretary for Population Affairs (Apr. 20, 1971), J.A. at 35.

[48] H.R. Conf. Rep. No. 1524, 93d Cong., 2d Sess. 58 (1974). *See also* S. Rep. No. 29, 94th Cong., 1st Sess. 66 (1975) ("[F]amily planning services under title X generally are most effectively provided in a general health setting and thus [the Committee] encourages coordination and integration into all programs offering general health care."). In the one reported case analyzing legislative intent on the issue of collocating Title X programs with other health care programs, including those that provide abortions, a federal district court struck down a state requirement that Title X programs be physically separate from abortion providers as violative of Title X's statutory intent. *See Planned Parenthood v. Montana*, 648 F. Supp. 47, 51 (D. Mont. 1986).

Congress has been repeatedly advised that because of this integration some Title X programs are located "down the hallway" from abortion providers,[49] it has made no attempt to change that practice.

2. *The Secretary's Drastic Physical Separation Requirements Frustrate the Statutory Goal of Integration of Family Planning Services*

As noted, the Secretary's original proposal generated a blizzard of negative comments. As to continuity of care, the Secretary noted that "[n]umerous comments, particularly from public providers, argued that the trend in public health has been to locate related services together, to facilitate full utilization by clients of needed services." 53 Fed. Reg. 2,939.

For all intents and purposes, the Secretary did not respond to the comments concerning continuity of care. In adopting the final rule, he stated, in relevant part:

> The example typically cited—the Title X clinic that is located at the same site as a project funded under another program that provides genetic screening and counseling—*may not be affected by the requirements revised, if the project can show that the later project's activities meet the separation indicia of § 59.9 below.* To the extent the rules below minimize continuity between family planning and abortion, this is a result which the Department views as consistent with section 1008.

Id. at 2,941 (emphasis added).

This "response" leaves grantees totally at sea as to what is required. It is also utterly at odds with the purpose of Title X. First, the Secretary in effect conceded that he did not know the extent to which his enforcement of the physical separation requirements will impede continuity of care. Second, the Secretary conceded that, to the extent that the rules do in fact impede continuity of care, he chose to subordinate the statutory objective to *his* separation requirements. Third, in consciously dis-

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[49] 124 Cong. Rec. 37,046 (1978) (statement of Rep. Rogers).

rupting the continuity of care between abortion providers and family planning services, he willfully and unnecessarily burdened the ability of persons, *in the aftermath of abortion*, to obtain family planning services. This "response" cannot be reckoned with Congress' clear intent to provide continuity of care to Title X patients and to expand the availability of family planning services.

CONCLUSION

For the foregoing reasons, *amici curiae* urge that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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